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Supreme Court of the United States.

October Term, 1962.

No. 981

MILK WAGON DRIVERS' UNION OF METROPOLITAN BOSTON, LOCAL 380, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellant,

v.

CITY OF BOSTON,
Appellee.

On Appeal from the Supreme Court of the Commonwealth of Massachusetts.

JURISDICTIONAL STATEMENT.

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Supreme Court of the United States.

OCTOBER TERM, 1962.

No.

MILE ROAD CORP.,
Appellant,

v.

CITY OF BOSTON,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

Appellant appeals from the final decree of the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts entered in the case of *Mile Road Corp.* v. *City of Boston,* numbered 79,774 on the equity docket of that Court, which decree dismissed the appellant's bill of complaint, after rescript from the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported in the Massachusetts Advance Sheets (1963) at pages 125-129, a copy of

which is printed as Appendix A to this statement (*infra*, p. 11).

Grounds of Jurisdiction.

The case was submitted to the Superior and Supreme Judicial Courts on uncontroverted facts which are set forth in the appellant's petition for declaratory relief, a copy of which is printed as Appendix B to this petition (*infra*, p. 16).

The federal question sought to be reviewed on this appeal was raised specifically in said Courts.

The said final decree, a copy of which is printed as Appendix C to this statement (*infra*, p. 21), was entered on February 7, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

Statute Involved.

The statute involved is Mass. St. 1962, c. 583, which reads as follows:

> "The city of Boston is hereby authorized and directed to prohibit the dumping of trash or refuse on land located in the Dorchester district in the area commonly called the Calf pasture, Mile road and Columbia point, said land being east and west of Mount Vernon street and east of Morrissey boulevard."

Question Presented.

Does the Massachusetts statute, Mass. St. 1962, c. 583, deprive the appellant of the use of its property without

due process of law in violation of the Fourteenth Amendment to the Constitution of the United States—

(1) By an arbitrary and oppressive exercise of the Commonwealth's police power; or

(2) By restricting its utilization to such an extent as to amount to a taking without compensation?

Statement of the Case.

This case was presented to the Superior and Supreme Judicial Courts on a petition for declaratory decree as to whether Mass. St. 1962, c. 583, violated the Constitutions of the United States and of Massachusetts. The facts which were alleged in the petition were undisputed. Those facts are that—

The appellant is the owner of a large tract of valuable land and flats having an area of about 4,000,000 square feet of land in the locality affected by the said statute, as shown on Exhibits X and Y (lettered A and B in the Superior Court),* on which it is maintaining and operating a private dump.

The land has a non-conforming use and is located in an industrial district. It has been duly licensed by state and municipal authorities for many years and has always been regarded as a public necessity.

The Superior Court issued an injunction against the enforcement of the statute and found as a fact that—

> ". . . the closing of the dump at this time will cause irreparable harm to the petitioner and is apt to cause a health menace to the community, until other areas are acquired which will be available for dumping, particularly the refuse from the extensive demolition of

*These exhibits have been filed as part of the record on appeal.

buildings that is now taking place within the limits of the City of Boston.

"The respondent City of Boston shall be directed to use the facilities that are available to it in properly policing the thoroughfares that lead to the areas involved to properly insure the safety of the public, and further to supervise the conduct of the trucks carrying refuse so that the lives and safety of the public will not be endangered."

and later reported the case to the Supreme Judicial Court for its decision. Thereafter the Supreme Judicial Court rendered the opinion which is printed at the end of this statement. Thereafter the Superior Court entered a final decree dismissing the petition.

Argument.

The lower Court's action raised a substantial and far-reaching federal question concerning the arbitrary use of police power and the restriction of use of real property without compensation.

The Supreme Judicial Court has decided the federal question in a way probably not in accord with the applicable decisions of this Court. As was said in *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U.S. 613, 619, 622:

> "A claim that action is being taken under the police power of the State cannot justify disregard of constitutional inhibitions. . . . Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

and in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413, 416:

"As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Throughout the country, the oldest cities are undergoing "face lifting" and modernization with the aid of the federal government. Buildings are being demolished throughout downtown areas and slums are being eliminated.

Boston, one of the oldest cities in our country, with its narrow streets and ancient structures, is being rebuilt. It is conceded that within that City there is no place other than the appellant's land and flats upon which to deposit the debris (trash and rubbish) which results from the demolition of the old buildings.

The opinion of the Supreme Judicial Court, at page 127, states that:

"The existence and maintenance of local dumps is a public necessity for the inhabitants of each municipality. The enforcement of c. 583 would cause great hardship to the city as to its sanitation needs and demolition requirements in that there is no other area within the city which is available for dumping, 'a vital need at the present time because of the extensive demolition going on in the city limits.' *These public considerations are without consequence in the case at bar.* The issue is whether St. 1962, c. 583, is unconstitutional as applied to the plaintiff." (Emphasis added.)

To take away the appellant's right to use its property for dumping purposes and at the same time to cause great hardship to the city as to its sanitation needs and demolition requirements because there is no other area within the city available for dumping is a great abuse of the police power. The Court's opinion that "these public considerations are without consequence in the case at bar" is incongruous. Unless there is benefit to the health of the public, there is no justification for the statute. Police power can only be properly exercised to safeguard the lives, morals, comfort, health, order, safety and general welfare of the public, but it cannot be exercised when those things will suffer a detriment or disadvantage or when there will be no benefit to the public.

In order to be a valid exercise of police power, the legislation (Mass. St. 1962, c. 583) must have had a rational relation to the public health, safety, welfare and prosperity of the community and not be arbitrary, destructive or confiscatory. There must have been a public necessity for such legislation. There was no such necessity. *Nectow* v. *Cambridge*, 277 U.S. 183, 188-189.

The doctrine of police power is a law of necessity. The exigency to be met must so concern public welfare as reasonably to suggest necessity for a legislative remedy.

Limiting the appellant in the enjoyment of its property is arbitrary and oppressive and does not square with any public necessity.

Mass. St. 1962, c. 583, is unconstitutional because it cannot be justified as a valid exercise of police power and its enforcement will arbitrarily prohibit the appellant from using its land and flats for their most beneficial use and from carrying on its lawful business and will deprive it of rights secured under our Constitution. *Sperry & Hutchinson Co.* v. *Director of Division on Necessaries of Life*, 307

Mass. 408, 418. *Opinion of the Justices,* 247 Mass. 589, 595-596.

There is nothing in the record nor in the title of the Act of the Legislature ("An Act prohibiting the dumping of refuse or trash in a certain section of the Dorchester District of the City of Boston.") to show that the restriction does bear a substantial relation to the public health, safety, morals or general welfare.

Before this Court should sanction legislation confiscating a legitimate business enterprise and invading the property rights of the appellant, there should first appear on the record a basis to support such legislation. No such basis appears.

Mass. St. 1962, c. 583, constitutes an arbitrary and unreasonable interference with the appellant's right of property in contravention of federal constitutional policies. It deprives the appellant of its property without advancing the common good. The appellant has suffered undue discrimination, treatment and classification. Constitutional uniformity and equality require some real and not feigned basis for public good.

The permits issued to the appellant, as well as the status assigned to its land and flats, are vested property rights, and not merely personal privileges which can be revoked at the will of the Legislature. *Adamsky* v. *City Council of New Bedford,* 326 Mass. 706, 708, citing *Saxe* v. *Street Commissioners of Boston,* 307 Mass. 495, 497, 498 (where cases are collected).

A "taking" of property may be effected by depriving the owner of any natural use of its property. *Griggs* v. *Allegheny County,* 369 U.S. 84 (by flying planes to its airport at very low altitude, county was held to have taken an air easement). Even a "taking" under police power requires compensation. *Crocker* v. *Champlin,* 202 Mass. 437, 442. *United States* v. *Causby,* 328 U.S. 256 (noise and glaring

lights of planes landing at or leaving an airport leased to the United States which interfered with the normal use of a neighboring chicken farm constituted a "taking" entitling the owner to compensation). *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (repeated firing of guns across land was a "taking"). *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (smoke and gas forced from a tunnel was a "taking"). *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348 (regulation of park commissioners prohibiting maintenance of business signs near parkway was contrary to provisions of Massachusetts Constitution in that it constituted a "taking" of property without providing compensation). *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (prohibiting mining under public street and private property was unconstitutional). *Welch* v. *Swasey*, 214 U.S. 91, 107.

It is not necessary that property be physically taken to bring the case within the protection of the Federal Constitution (*Manigault* v. *Springs*, 199 U.S. 473, 484-485), but there may be, as here, such serious interruption to the common and necessary use of property as will be equivalent to a taking. As was said in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177-178:

> "It would be . . . [an] unsatisfactory result, if . . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it [has] not [been] *taken* for the public use."

Any injury to property of an individual which deprives the owner of an ordinary use of it is equivalent to a taking

and entitles him to compensation. *Peabody* v. *United States*, 231 U.S. 530. *United States* v. *Lynah*, 188 U.S. 445.

Whether or not a taking is for a public use is a judicial question. *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 556, and cases cited (Stone, C.J., and Reed, J.).

Every person, even a corporation, has a right to conduct a lawful business, which is a property right that is guaranteed and must be protected. *A. T. Stearns Lumber Co.* v. *Howlett*, 260 Mass. 45, 49, and cases cited.

It was said in *Bent* v. *Emery*, 173 Mass. 495, at 496:

> "... an owner might be stripped of his rights so far as to amount to a taking without any physical interference with his land."

See also *Crocker* v. *Champlin*, 202 Mass. 437, 442.

The instant statute could be so construed as to prevent a householder in the area from depositing trash and rubbish in his own back yard even though it was enclosed in a proper container and he had a permit from the City of Boston.

Conclusion.

Mass. St. 1962, c. 583, is directed solely against the Calf Pasture and does not apply to any other land in the Commonwealth. Dumping trash and refuse is fully controlled by existing state statutes and municipal ordinances. This statute takes away from the appellant valuable property rights in the use of its land and in effect declares such use to be a public detriment, without affording the appellant a judicial trial. This legislation is tantamount to a bill of attainder in violation of the United States Constitution, Article I, §§ 9, 10.

For the foregoing reasons the appellant should be granted the opportunity of fully presenting the merits of this appeal with briefs and oral arguments.

Respectfully submitted,

MAURICE CARO,

EDWARD M. DANGEL,

LEO E. SHERRY,

Counsel for Appellant.

Appendix A.

OPINION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MILE ROAD CORP. *vs.* CITY OF BOSTON.

Suffolk. January 9, 1963.—February 4, 1963.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, SPIEGEL, & REARDON, JJ.

Dump. Constitutional Law, Dump, Police power. *Public Health. Statute,* Construction. *Boston. Permit. Words;* "Trash," "Refuse."

Report by *Tomasello,* J., of a suit in equity in the Superior Court.

WILKINS, C.J. This bill under G. L. c. 231A seeking a binding declaration as to the constitutionality of St. 1962, c. 583, entitled, "An Act prohibiting the dumping of refuse or trash in a certain section of the Dorchester district of the city of Boston," is here on a report without decision by a judge of the Superior Court. The facts alleged in the bill and admitted in the answer are given, by stipulation, the effect of a case stated. Notice pursuant to G. L. c. 231A, § 8, was given to the Attorney General, who filed an affidavit of receipt of notice, but took no other action.

The statute in its entirety reads: "The city of Boston is hereby authorized and directed to prohibit the dumping of trash or refuse on land located in the Dorchester district in the area commonly called the Calf pasture, Mile road and Columbia point, said land being east and west of Mount Vernon street and east of Morrissey boulevard."

The plaintiff, under a deed dated March 1, 1962, duly recorded, is "the owner of a large and valuable tract of vacant land (the locus) containing approximately 4,000,000 square feet" which is within the area described in the statute. Although the record is not precise in this respect, an inspection of exhibits reveals that the plaintiff's land, large as it

is, is but a small part of the total area affected. No charge of spot zoning, therefore, can soundly be made, wholly apart from the inappropriateness of the phrase as applied to the Legislature. See *Marblehead* v. *Rosenthal*, 316 Mass. 124, 126.

For the purposes of the Boston Zoning Act, St. 1924, c. 488, the locus is in an industrial district, but its use as a dumping ground is a nonconforming use until April 1, 1986. For many years before 1933 and at all times since, ordinances of the city have prescribed that "No person shall place or keep any refuse or noxious or decaying liquid or solid matter, except house-offal, in any building or in any waters or on any land, except in accordance with a permit from the health commissioner"; and that "No person shall deposit or dump any house-dirt, house-offal, or other refuse matter, except in a place approved by the health commissioner." Beginning in 1933, the health commissioner has granted annual permits to dump refuse on the locus to the respective owners, including the plaintiff, all of whom, pursuant to such permits, have operated and maintained a private dump. The permit contains the statement, "It is understood and agreed that this permit may be revoked or restricted at any time by the health commissioner and his decision in the matter shall be final."

When the plaintiff acquired title, it became vested in fee with a parcel of land deemed, pursuant to St. 1955, c. 310, § 2, to have been assigned as a dumping ground for garbage, rubbish, or other refuse, under G.L. c. 111, § 150A (inserted by St. 1955, c. 310, § 1). Such assignment, apart from how it may have been affected by St. 1962, c. 583, if constitutional, has not been rescinded, suspended, or modified except by a communication dated April 12, 1962, from the State Department of Public Health, which no one argues is presently material. The plaintiff has been issued a permit to make fires in the open air. St. 1943, c. 355. The

plaintiff has a large and substantial investment in the dump, and enforcement of St. 1962, c. 583, will put the plaintiff out of business without compensation.

The existence and maintenance of local dumps is a public necessity for the inhabitants of each municipality. The enforcement of c. 583 will cause great hardship to the city as to its sanitation needs and demolition requirements in that there is no other area within the city which is available for dumping, "a vital need at the present time because of the extensive demolition going on in the city limits." These public considerations are without consequence in the case at bar. The issue is whether St. 1962, c. 583, is unconstitutional as applied to the plaintiff. *Massachusetts Comm. Against Discrimination* v. *Colangelo*, 344 Mass. , ,[1] and cases cited.

"One assailing a statute on constitutional grounds has the burden of proving the absence of any conceivable grounds upon which the statute may be supported." *Merit Oil Co.* v. *Director of the Div. on the Necessaries of Life*, 319 Mass. 301, 305. *Commonwealth* v. *Chamberlain*, 343 Mass. 49, 51–52.[2] The decision as to what measures are necessary for the preservation of life, health, and morals is in the first place a matter for the Legislature, and every presumption must be made in favor of the validity of statutes enacted to further those objectives. *Paquette* v. *Fall River*, 338 Mass. 368, 376. "If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature." *Druzik* v. *Board of Health of Haverhill*, 324 Mass. 129, 139. *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* Mass. , .[3]

The question is not, as stated by the plaintiff, whether the record affirmatively shows that the legislative restriction

[1] Mass. Adv. Sh. (1962) 835, 837.

[2] Mass. Adv. Sh. (1961) 1091, 1093.

[3] Mass. Adv. Sh. (1962) 1203, 1208.

bears a substantial relation to the public health, safety, morals, or general welfare. Nor is the absence of a preamble to St. 1962, c. 583, of significance. See *Milk Control Bd.* v. *Gosselin's Dairy, Inc.* 301 Mass. 174, 179-180. On the other hand, we cannot accept an argument of the defendant that the statute must be construed as limited to "waste material that is combustible or putrescible." These words do not appear in any statute or case which the defendant cites. The details of the argument are that, as stated in *Kenney* v. *Building Commr. of Melrose,* 315 Mass. 291, 295, "A general term in a statute or ordinance takes meaning from the setting in which it is employed"; and that the statute, being in derogation of the common law, is to be strictly construed, citing *Corcoran* v. *S. S. Kresge Co.* 313 Mass. 299, 303. Hence, the view is projected that "refuse" must be read in conjunction with "trash" which precedes it in the body of the statute.[1] Even upon this assumption the defendant's theory is not advanced. We think that the words "trash" and "refuse" are synonymous and share a meaning which is roughly the equivalent of "waste," "rubbish," or "debris." See *Building Commr. of Medford* v. *C. & H. Co.* 319 Mass. 273, 285. Compare *Haley* v. *Boston,* 191 Mass. 291, 293.

A statute, of course, must be construed, if possible, to avoid serious constitutional doubts. *Worcester County Natl. Bank* v. *Commissioner of Banks,* 340 Mass. 695, 701. *Opinion of the Justices,* 341 Mass. 760, 785. This principle, however, does not authorize the judiciary to supply qualifying words not fairly to be imported from the actual language of the statute. The brevity of St. 1962, c. 583, is such as to provide no setting from which the suggested limitation may be implied. The act must be construed as an absolute prohibition of dumping in the area where the plaintiff's

[1] In the title of the act the words appear in the opposite order.

land is situated. As applied to that land, the question is whether the act is tantamount to a taking of property without due process of law.

While it is agreed that the plaintiff is put out of business as a dump operator, the record does not show that the land cannot be filled and put to other use. There has not, therefore, been a complete deprivation of property so as to be the equivalent of a taking without compensation. See *Reinman* v. *Little Rock*, 237 U. S. 171; *Miller* v. *Schoene*, 276 U. S. 272.

In so far as the plaintiff's business has been stopped, there is nothing in the meager facts to overcome the presumption of statutory validity. There is likewise nothing to demonstrate that this is a case where the Legislature is prevented from making a determination that circumstances have become such that a dump should no longer be operated in the area. See *Pendoley* v. *Ferreira*, Mass. , ;[1] *Hadacheck* v. *Los Angeles*, 239 U. S. 394.

The defendant concedes that St. 1962, c. 583, abrogates the permit granted by the health commissioner and the statutory assignment of the plaintiff's land as a dumping site in so far as they have not been exercised. These were not vested property rights immune from governmental action prospectively effective. The health commissioner's permit was expressly subject to revocation. The assignment of the land as a dumping site could be repealed or amended by a later statute. See *Calder* v. *Kurby*, 5 Gray, 597, 598; *Lowell* v. *Archambault*, 189 Mass. 70, 71, 72.

A final decree is to be entered declaring that St. 1962, c. 583, is not unconstitutional as applied to the plaintiff.

So ordered.

Maurice Caro, (*Edward M. Dangel & Leo E. Sherry* with him,) for the plaintiff.

William H. Kerr, for the defendant.

[1] Mass. Adv. Sh. (1963) 41, 44.

Appendix B.

SUBSTITUTE PETITION FOR DECLARATORY RELIEF.

RESPECTFULLY REPRESENTS your petitioner:

1. Your petitioner, Mile Road Corp., a corporation duly organized under the laws of this Commonwealth and having a principal place of business in Boston in the County of Suffolk, brings this petition under Chapter 231A of the General Laws against the respondent City of Boston, a lawfully existing municipal corporation in this Commonwealth, for a declaratory judgment as to the constitutionality of Chapter 583 of the Acts of 1962 entitled "An Act Prohibiting the Dumping of Refuse or Trash in a Certain Section of the Dorchester District of the City of Boston" which provides:

> "The city of Boston is hereby authorized and directed to prohibit the dumping of trash or refuse on land located in the Dorchester district in the area commonly called the Calf pasture, Mile road and Columbia point, said land being east and west of Mount Vernon street and east of Morrissey boulevard."

2. Your petitioner is by virtue of a deed dated March 1, 1962 and duly recorded with Suffolk Deeds, Book 7629, Page 188, the owner of a large and valuable tract of vacant land (the locus) containing approximately 4,000,000 square feet and bounded and described as follows:

> A certain parcel of land and flats on Mt. Vernon Street in that part of said Boston, formerly Dorchester, bounded and described as follows: Northeasterly by Mt. Vernon Street 429.69 feet; Southeasterly by land

now or late of the City of Boston 206.86 feet; Northeasterly by the same; Southeasterly and Southerly by Dorchester Bay; Southwesterly by flats now or late of Mary E. Day registered in Land Court Case No. 5939 by two lines 520.96 feet and 922.23 feet; Northwesterly by land and flats now or late of said Mary E. Day by two lines 206.81 feet and 523 feet; Southwesterly partly by the same and partly by land now or late of Willard Welsh Realty Company 290.05 feet; and Northwesterly partly by said Willard Welsh Realty Company land and partly by land now or late of the City of Boston 416.73 feet, be all of said measurements more or less.

3. The locus is part of the land described in Chapter 583 of the Acts of 1962 and is shown on the plan attached hereto and hereby made a part hereof as Exhibit A. The land described in said Chapter 583 is shown on the plan attached hereto and hereby made a part hereof as Exhibit B.

4. For the purposes of St. 1924, c. 488 (Boston's zoning act), the locus is in an industrial district; but use of the locus as a dumping ground is a use which is a non-conforming use under St. 1924, c. 488, and may be continued thereunder until, but not after, April 1, 1986.

5. Throughout the year 1933, and at all times since, and for many years before, ordinances of the respondent have prescribed that—

> "No person shall place or keep any refuse or noxious or decaying liquid or solid matter, except house-offal, in any building or in any waters or on any land, except in accordance with a permit from the health commissioner."

and that—

> "No person shall deposit or dump any house-dirt, house-offal, or other refuse matter, except in a place approved by the health commissioner . . . ."

6. In 1933, the respondent's Health Commissioner, acting pursuant to the aforesaid provisions of ordinance, granted an annual permit to the then owner of the locus to dump refuse on the locus, and annually thereafter renewed such permit for such owner or for the successors in title to such owner, including your petitioner; and such owner and the successors in title to such owner, including your petitioner, have operated and maintained on such tract under such permits a private dump. A photocopy of the permit so issued to your petitioner is annexed hereto and hereby made a part hereof as Exhibit C.

7. When your petitioner acquired title to the locus, your petitioner became vested in fee with a parcel of land deemed pursuant to St. 1955, c. 310, s. 2, to have been assigned as a dumping ground for garbage, rubbish or other refuse under Section 150A of Chapter 111 of the General Laws; such assignment, except insofar as it may be affected by Chapter 583 of the Acts of 1962 if constitutional, has not been rescinded, suspended or modified except as set forth in the communication from the State Department of Public Health a photocopy of which is annexed hereto and hereby made a part hereof as Exhibit D.

8. There has also been issued to your petitioner under Chapter 355 of the Acts of 1943 a permit to make fires in the open air on the locus. A photocopy of such permit, including the reverse side thereof, is annexed hereto and hereby made a part hereof as Exhibit E.

9. Your petitioner has a large and substantial investment in the dump it is maintaining and operating under the aforesaid licenses and assignment (as modified by Exhibit D); and enforcement of said Chapter 583 will put your petitioner out of business without compensation.

10. The existence and maintenance of local dumps is a public necessity for the inhabitants of each city or town; and the enforcement of said Chapter 583 will cause great hardship to the respondent City of Boston as to its sanitation needs, and demolition requirements, in that there is no other area within the city that is available for dumping, —a vital need at the present time because of the extensive demolition going on in the city limits.

11. Your petitioner is complying strictly with the terms and conditions of the aforesaid licenses and assignment (as modified by Exhibit D); and its operations do not affect the peace, safety or health of the area.

12. Your petitioner respectfully contends that Chapter 583 of the Acts of 1962 is unconstitutional; that it deprives your petitioner of property rights without compensation, and violates the 14th Amendment of the Federal Constitution of the United States and Articles 1, 10 and 12 of the Declaration of Rights of the Constitution of this Commonwealth and further that said Chapter 583 is unconstitutional in that it is unreasonable, vague, class legislation, discriminatory and confiscatory.

13. Your petitioner further contends that Chapter 583 of the Acts of 1962 is unconstitutional for the reason that it is beyond the power of the legislature to direct a city to prohibit dumping in a specified area; that such an order

is an impairment of the contract between the State and the City and abridges and impairs the legislative powers of the city.

14. Your petitioner further represents that the closing of the dump will cause your petitioner irreparable harm unless the respondent is restrained in carrying out the legislative mandate.

WHEREFORE YOUR PETITIONER PRAYS:

1. That a declaratory judgment enter as to the constitutionality of Chapter 583 of the Acts of 1962.

2. That the respondent city of Boston be temporarily restrained and enjoined from prohibiting the dumping of trash or refuse on land located in the Dorchester District in the area commonly called the Calf Pasture, Mile Road and Columbia Point, said land being east and west of Mt. Vernon Street and east of Morrissey Boulevard.

3. That the respondent city of Boston be restrained and enjoined from prohibiting the dumping of trash or refuse on land located in the Dorchester District in the area commonly called the Calf Pasture, Mile Road and Columbia Point, said land being east and west of Mt. Vernon Street and east of Morrissey Boulevard.

4. And for such further relief as to this Court may seem just and meet.

MILE ROAD CORP.
By MAURICE CARO
Its Attorney.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. SUPERIOR COURT.
No. 79774-Eq. IN EQUITY

MILE ROAD CORP.
Petitioner
vs.
CITY OF BOSTON
Respondent

FINAL DECREE AFTER RESCRIPT.

This cause came on to be further heard upon the rescript from the Supreme Judicial Court and was argued by counsel and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED, and DECREED that St. 1962 c. 583 is not unconstitutional as applied to the petitioner.

By the Court, (Thompson, J.)
JOSEPH A. GROVER
Assistant Clerk.

Entered February 7, 1963.

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 981

MILE ROAD CORP.,

Appellant,

vs.

CITY OF BOSTON,

Appellee.

APPELLEE'S MOTION TO DISMISS.

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Motion.

The appellee in the above-entitled appeal moves that said appeal be dismissed either on the ground that it is not within the jurisdiction of this Court because not taken in conformity to the Rules of this Court, or on the ground that it does not present a substantial federal question, or on both of said grounds.

Statement of Basis of Motion.

(a) The appeal has not been taken in conformity to the Rules of this Court.

The jurisdictional statement filed in this appeal does not, as required by paragraph 2 of Rule 13 of the Rules of this Court, comply in all respects with Rule 15 thereof for that (1) it fails to mention that the opinion below is unofficially reported in 187 N.E. 2d 826; and (2) it fails to state the date the notice of appeal was filed, and the court in which it was filed.

(b) The appeal does not present a substantial federal question of an arbitrary and oppressive exercise of state police power.

Appellant contends (Juris. S. 2–3) that Mass. St. 1962, c. 583, is an arbitrary and oppressive exercise of a state's police power. "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257–258. "The burden is not sustained by making allegations which are merely the general conclusions of law or fact. . . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth." *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185.

Contrary to implications in the jurisdictional statement (pp. 2–3), as more fully appears from the respondent's answer, only the facts in the first ten paragraphs of the petition were admitted, and it was upon them and them only that the cause was submitted by the stipulation. So far as the issue of arbitrary and oppressive action is concerned, these facts are meager. The two plans included in the record, particularly when attention is paid to their substantially different scales, make it clear not only that Mass. St. 1962, c. 583, does not relate solely to the appellant's land, but that although that land, considered by itself, is a large tract containing about four million square feet, yet the land described in Mass. St. 1962, c. 583, is a markedly greater area. The record is completely silent as to whether the appellant has the only trash or refuse dump in the area described in Mass. St. 1962, c. 583, and as to what the use or uses are to which the other lands lying within that area are put. For all that appears in

this case, there may be a dense population in the area described in Mass. St. 1962, c. 583. It is submitted that the facts are too meager to present a substantial federal question of arbitrary or oppressive action.

Moreover, "so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment." *Reinman* v. *Little Rock*, 237 U. S. 171, 177 (livery stable), followed in *Hadacheck* v. *Los Angeles*, 239 U. S. 394 (brick yard). "Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property . . . . ." *Northwestern Laundry* v. *Des Moines*, 239 U. S. 486, 492 (smoke control). "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Miller* v. *Schoene*, 276 U. S. 272, 279–280 (cedar trees). In view of these decisions, we submit that the federal question involved is not sufficiently substantial to support the appeal. *Zucht* v. *King*, 260 U. S. 174, 177.

The jurisdictional statement (p. 5) emphasizes that respecting the public necessity of local dumps and the great hardship ensuing to the appellee City from Mass. St. 1962, c. 583, the Supreme Judicial Court of Massachusetts said: "These public considerations are without consequence in the case at bar." This Court will note that the Supreme Judicial Court of Massachusetts immediately went on to say: "The

issue is whether St. 1962, c. 583, is unconstitutional as applied to the plaintiff." What the Supreme Judicial Court of Massachusetts was saying in the sentence the appellant emphasizes and calls incongruous (Juris, S., p. 6) was that in asserting Mass. St. 1962, c. 583, to be unconstitutional as applied to it, the appellant could not rely on the public necessity for dumps or the hardship to the appellee City. When there are competing public considerations, it is for the legislature to determine which shall control. Compare *Miller* v. *Schoene*, 276 U. S. 272, 279. The words "These public considerations are without consequence in the case at bar" thus present no substantial federal question.

(c) The appeal does not present a substantial federal question of a restriction of land use to such an extent as to amount to a taking without compensation.

This Court must consider the effect of Mass. St. 1962, c. 583, and of the permit and assignment, as interpreted by the Supreme Judicial Court of Massachusetts. *Williams* v. *Oklahoma*, 358 U.S. 576, 583. Respecting the permit and assignment that Court said (Juris, S., p. 15): "These were not vested property rights immune from governmental action prospectively effective. The health commissioner's permit was expressly subject to revocation. The assignment of the land as a dumping site could be repealed or amended by a later statute." The appellant is thus incorrect when it asserts (Juris, S., p. 7): "The permits issued to the appellant, as well as the status assigned to its land and flats, are vested property rights . . . ." As for Mass. St. 1962, c. 583, itself, what the Supreme Judicial Court of Massachusetts has held is this: "The act must be construed as an absolute prohibition of dumping in the area where the plaintiff's land is situated. As applied to that land,

the question is whether the act is tantamount to a taking of property without due process of law. While it is agreed that the plaintiff is put out of business as a dump operator, the record does not show that the land cannot be filled and put to other use. There has not, therefore, been a complete deprivation of property so as to be the equivalent of a taking without compensation. See *Reinman* v. *Little Rock*, 237 U. S. 171; *Miller* v. *Schoene*, 276 U. S. 272. In so far as the plaintiff's business has been stopped, there is nothing in the meager facts to overcome the presumption of statutory validity. There is likewise nothing to demonstrate that this is a case where the Legislature is prevented from making a determination that circumstances have become such that a dump should no longer be operated in the area." Juris, S , pp. 14–15.

Pertinent pronouncements of this Court are to be found in *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, where it is said (p. 168): "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. . . . In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking. . . . However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." Compare *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, 386, where this Court tersely stated: "when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government", and *Mugler* v. *Kansas*, 123 U. S. 623; 668–669, to the effect that "A prohibition

simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."

On this branch of the case, it must be emphasized that Mass. St. 1962, c. 583, does not result in acquisition of title or occupancy by government. Governmental action short of acquisition of title or occupancy amounts to a taking only "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378. Since Mass. St. 1962, c. 583, only prohibits dumping, it obviously does not deprive the appellant of all or most of its interest in the land. Cases cited by the appellant (Juris. S., pp. 7-9) are readily distinguishable as involving direct invasions of an owner's domain. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (flooding of land). *United States* v. *Lynah*, 188 U. S. 445 (flooding of land). *Manigault* v. *Springs*, 199 U. S. 473 (flooding of land). *Richards* v. *Washington Terminal Co.*, 233 U. S. 546 (intrusion of smoke and gases). *Peabody* v. *United States*, 231 U. S. 530 (gunfire over land). *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (gunfire over land). *United States* v. *Causby*, 328 U. S. 256 (frequent, low flight of aircraft over land). *Griggs* v. *Allegheny County*, 369 U. S. 84 (similar flight of aircraft). The decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, was due to the acquisition of only surface rights without the right of support. See p. 415. Nor does the case at bar resemble *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, where a highway commission ordered transmission lines in private ways relocated without compensation to permit construction of a new highway.

Conclusion.

Appellee's motion to dismiss should be granted, and the appeal dismissed.

Respectfully submitted,

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PRINTING SECTION

Supreme Court, U.S.
FILED
NOV 13 1963
JOHN F. DAVIS, CLERK

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CITY OF BOSTON,
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APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

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APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

Statement.

The appellee's motion to dismiss is based on the assertions (1) that the appeal was not taken in conformity to the Rules of Court, or (2) that the appeal does not present a substantial federal question.

Argument.

(1) The appellee contends that this Court has no jurisdiction in the subject matter of this case inasmuch as the jurisdictional statement failed to mention that the opinion appealed from is also listed in an unofficial report; and said statement failed to state the date the notice of appeal was filed and the court in which it was filed; all as required by Rules of this Court.

That there was a failure to mention an unofficial reporting of this case does not seem to the appellant to constitute

such oversight as may tend to mislead the Court or fail to present the true and accurate decision of the court appealed from. The citation of the official report was in fact given and the report itself included in the statement as Appendix A.

Similarly it is plain that omission of a statement of the date the notice of appeal was filed and the court in which it was filed was an inadvertent omission of certain procedural aspects clearly set forth in the properly certified record of the case presented to this Court and which clearly indicates that the appeal was seasonably and properly taken and which latter points are not argued by the appellee.

It is respectfully submitted that, if a matter is itself a proper subject of appeal, and properly and seasonably brought before this Court, then this Court will ordinarily not refuse to consider it if, though through inadvertence, as here advanced, there have been omitted pro forma statements or assertions.

(2)(*a*) The appellee contends that the appeal does not present a substantial federal question of an arbitrary and oppressive exercise of police power and presents general statements of law.

In support of this contention the appellee disputes the implications in the jurisdictional statement and asserts that the facts are too meager to present a substantial federal question of arbitrary or oppressive action.

It is respectfully suggested that mere volume of assertions, or verbosity, in presentation of facts does not thereby create a substantial federal question.

The certified record in this Court shows that the City of Boston Health Department issued a permit to the appellant, under date of March 16, 1962, which contains terms and conditions, and permits the appellant to dump ashes and house refuse. It is a printed form and issued to all

applicants who qualify. It was issued pursuant to the General Laws of the Commonwealth of Massachusetts for use of land assigned as a dumping ground for garbage, rubbish or other refuse pursuant to the provisions of Massachusetts General Laws, chapter 111, section 150A. The court appealed from so noted in its opinion (Appendix A, Jurisdictional Statement, p. 12).

G.L. c. 111, § 150A, is a statute of general application and applies to all cities and towns and all who seek permission for dumping.[1]

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[1] MASSACHUSETTS GENERAL LAWS, CHAPTER 111.

SECTION 150A. No place in any city or town shall be established or maintained by any person, including any political subdivision of the commonwealth, as a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator unless such place has been assigned by the board of health of such city or town as a dumping ground or as a site for a refuse disposal incinerator subject to the provisions of any ordinance or by-law adopted therein under chapter forty A or corresponding provisions of earlier law. The assignment of a place as a dumping ground or as a site for a refuse disposal incinerator shall be conditioned upon such limitations with respect to the extent, character and method of operation thereof as may be necessary to protect the public health, comfort and convenience. The department shall advise, upon request, any board of health previous to the assignment of a place as a dumping ground or as a site for a refuse disposal incinerator; and any person aggrieved by the action of a board of health in assigning a place as a dumping ground or as a site for a refuse disposal incinerator, including persons in control of any public land, the selectmen of any town, and in cities having a Plan D or Plan E charter the city manager, and in other cities the mayor, when authorized by vote of the city council, may, within sixty days, appeal to the department from the assignment of the board of health, and the department may, after due notice and public hearing, rescind or suspend such assignment or modify the same by the imposition or amendment of conditions.

Every person, including every political subdivision of the commonwealth, maintaining or operating a place assigned as a dumping ground or as a site for a refuse disposal incinerator, shall maintain and operate the same in such manner as will protect the public health, comfort and convenience and prevent a nuisance or a danger

The appellant was singled out by the Legislature to be treated differently from all others who come within the purview of that statute. When the Legislature enacted chapter 583, Acts of 1962,[2] it did not modify or in any way amend or affect the application of G.L. c. 111, § 150A; while it remained applicable to all others, it was made not applicable to the appellant alone. Chapter 583 of the Acts of 1962 was aimed only at the appellant to prevent it from coming under G.L. c. 111, § 150A, while all others similarly situated were permitted to comply with G.L. c. 111, § 150A, and allowed dumping operations.

The court below found that "The act must be construed as an absolute prohibition of dumping in the area where the plaintiff's land is situated" (App. A, Jur. Statement, pp. 14-15).

Similarly, pursuant to chapter 355 of the Acts of 1943, governing the issuance of permits to maintain fires in the open air in the City of Boston, the appellant had been

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to the public health by reason of odor, dust, fires, smoke, the breeding or harboring of rodents, flies or vermin, or other cause. The assignment of any place as a dumping ground or as a site for a refuse disposal incinerator may be rescinded or suspended, or may be modified through the imposition or amendment of conditions, at any time after due notice and public hearing, by the board of health of the city or town where it is located, or by the department upon determination that the dumping ground or site for a refuse disposal incinerator results in a nuisance and a danger to the public health.

The superior court shall have jurisdiction in equity to enforce the provisions of this section upon petition of the department or any person aggrieved.

[Inserted by Acts of 1955, c. 310.]

[2] MASSACHUSETTS ACTS OF 1962, CHAPTER 583.

The city of Boston is hefeby authorized and directed to prohibit the dumping of trash or refuse on land located in the Dorchester district in the area commonly called the Calf pasture, Mile road and Columbia point, said land being east and west of Mount Vernon street and east of Morrissey boulevard.

issued a permit, on March 5, 1962, to make fires in the locus (*ibid.* p. 12), subject to all the terms and conditions prescribed for all to whom such permits are issued.

Neither the dumping permit nor the fire permit had been rescinded, suspended or modified in a material way (*ibid.* p. 12), nor was it at any time or anywhere suggested in the record that the appellant was not complying with the requirements of the permits when the Legislature enacted the statute complained of.

To single out the appellant for denial of statutory rights or benefits (G.L. c. 111, § 150A; Acts of 1943, c. 355) accorded all others is violative of the principle laid down by this Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, that the police power must not be exercised arbitrarily; it must be so exercised as not to deny to any person the equal protection of the laws.

It is not deemed necessary, in this brief, to again cite authorities set forth in the jurisdictional statement. It is apparent, on the face of the proceedings, that there was an abuse of police power sufficient to give this Court cognizance of this case.

The statute did not inure to the benefit of the municipality. The court below found "The enforcement of c. 583 will cause great hardship to the city as to its sanitation needs and demolition requirements in that there is no other area within the city which is available for dumping, 'a vital need at the present time . . .' " (*ibid.* p. 13). At the same time the said court "agreed that the plaintiff is put out of business as a dump operator" (*ibid.* p. 15).

(2)(*b*) The appellee urges dismissal on the ground that the appeal does not present a substantial question of restriction of land use to such an extent as to amount to a taking without compensation.

All that was said above is pertinent to any argument under this heading. The court below said: "While it is

agreed that the plaintiff is put out of business as a dump operator, the record does not show that the land cannot be filled and put to other use. There has not, therefore, been a complete deprivation of property so as to be the equivalent of a taking without compensation" (*ibid.* p. 15).

It is respectfully submitted that, aside from the effect of the complained of statute on the value of the land, the effect on the appellant's business must be considered. The court below specifically found that "The plaintiff has a large and substantial investment in the dump, and enforcement of St. 1962, c. 583, will put the plaintiff out of business without compensation" (*ibid.* pp. 12-13).

This Court has held in *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission,* 294 U.S. 613, at 622: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

That principle is applicable here. It should have been observed by the Legislature and enforced by the court. Because it was not observed and enforced, the appellant's only recourse is to this tribunal.

Conclusion.

It is therefore respectfully urged that the appellee's motion to dismiss be denied and the matter proceed to be heard on its merits.

Respectfully submitted,

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